

Clark J. Burnham, State Bar No. 041792  
 Email: cburnham@burnhambrown.com  
 Liz C. Kim, State Bar No. 225550  
 Email: ekim@burnhambrown.com  
 Alison F. Greene, State Bar No. 148309  
 Email: agreene@burnhambrown.com  
 BURNHAM BROWN  
 A Professional Law Corporation  
 P.O. Box 119  
 Oakland, California 94604  
 ---  
 1901 Harrison Street, 11th Floor  
 Oakland, California 94612  
 Telephone: (510) 444-6800  
 Facsimile: (510) 835-6666

Attorneys for Defendant  
 LINCOLN GENERAL INSURANCE COMPANY,  
 a Pennsylvania corporation

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

BRANDON IMHOFF dba BBI  
 CONSTRUCTION,

Plaintiff,

v.

LINCOLN GENERAL INSURANCE  
 COMPANY, AMERICAN CLAIMS  
 MANAGEMENT, INC. dba AMERICAN  
 COMMERCIAL MANAGEMENT, et al.,

Defendants.

No. C-08-02127 MEJ

**JOINT INITIAL CASE MANAGEMENT  
 CONFERENCE STATEMENT**

**and PLAINTIFF'S REQUEST FOR  
 TRIAL BY JURY**

**Date: July 31, 2008**  
**Time: 10 a.m.**  
**Ctrm. B**

AND RELATED CROSS-ACTION

Plaintiff Brandon Imhoff dba BBI Construction and defendant and cross-complainant Lincoln General Insurance Company file the following joint initial case management conference statement pursuant to Civil Local Rule 16 and FRCP 26:

1. Jurisdiction and Service: This case was removed by Lincoln General Insurance Company from the Napa County Superior Court on or about April 24, 2008. Plaintiff dismissed defendant American Claims Management, Inc. dba American Commercial Management ("ACM") following several demurrers were sustained regarding the lack of liability

1 on the part of ACM. Once ACM was dismissed, diversity existed between plaintiff and  
2 defendant Lincoln General and the case was removed. All parties have been served and have  
3 appeared.

4 2. Facts: Plaintiff filed this bad faith action to obtain a defense in an underlying  
5 construction defect action. Defendant accepted the defense under a reservation of rights and has  
6 assigned defense counsel. Defendant has reimbursed plaintiff for the stated amount of his post-  
7 tender defense fees and costs. The underlying construction defect claim is pending in the Napa  
8 County Superior Court.

9 3. Legal Issues: The underlying construction defect action against Plaintiff was  
10 filed November 8, 2006. Plaintiff tendered the underlying action for defense and indemnity  
11 under the Lincoln General policy four times: by letters dated December 8, 2006; January 9,  
12 2007; February 5, 2007; and March 2, 2007. Plaintiff hired his own attorneys to defend the  
13 underlying action. On June 7, 2007, Lincoln appointed counsel to defend Plaintiff in the  
14 underlying action. Plaintiff contends that the Defendant Lincoln General unreasonably delayed  
15 in responding to the tender of defense in the underlying action so as to cause damages to  
16 Plaintiff. Plaintiff has pleaded both tort and contract claims, and alleges both economic and non-  
17 economic damages for Lincoln's tortious breach of the covenant of good faith and fair dealing.

18 Defendant contends that there is no merit to the pending bad faith action. The defense  
19 has been accepted, and the insured has been reimbursed for the stated amount of his post-tender  
20 defense fees and costs. There are potentially serious coverage issues, including but not limited  
21 to whether the insured's potential liability arises out of an undisclosed joint venture, for which  
22 there would be no coverage, and whether the "work product" exclusions under the policy may  
23 apply.

24 Plaintiff contends that the ultimate issue of whether there is or is not coverage in the  
25 underlying action is irrelevant to any determination of whether Lincoln unreasonably delayed in  
26 agreeing to do what they took six months to do, and what they could have done immediately:  
27 defend the case under a standard reservation of rights.

28 //

1           4.     Motions:     No motions have yet been filed in this court. Defendant  
2 anticipates filing a motion for summary judgment, or alternatively, for summary adjudication.

3           5.     Amendment of Pleadings:     Defendant does not currently intend to amend any  
4 of its pleadings. Plaintiff does not currently anticipate amendment of the Third Amended  
5 Complaint.

6           6.     Evidence Preservation:     The parties have preserved all relevant evidence  
7 that is in their care, custody or control.

8           7.     Disclosures:     The parties conducted several rounds of discovery while the case  
9 was venued in the Napa County Superior Court. The parties are continuing with the initial  
10 disclosure procedure.

11           8.     Discovery:     While in the state court, plaintiff propounded requests for  
12 production of documents and form interrogatories to both Lincoln General and ACM.  
13 Defendants responded to all discovery. Defendants also propounded special interrogatories,  
14 requests for admission and requests for production of documents. Plaintiff responded to all  
15 discovery.

16           Defendant intends to propound additional written discovery and to take several  
17 depositions of the insured and several other individuals to be identified by plaintiff.

18           In addition to expert discovery, Plaintiff will take the depositions of person(s) most  
19 knowledgeable for the Defendant insurer with regard to their policies and procedures for claims  
20 handling generally, and how this particular claim was handled; and will take the depositions of  
21 person(s) most knowledgeable for the third party claims administrators to whom Lincoln  
22 referred this claim when it was tendered. Additional document requests and follow up  
23 interrogatories will be propounded as needed.

24           9.     Class Actions: Not applicable.

25           10.    Related Cases: *Scott v. Gerosa, et al.*, Napa County Superior Court Case No. 26-  
26 35647.

27           11.    Relief: Plaintiff seeks economic and non-economic compensatory damages  
28 including attorney fees and costs incurred in defending the underlying action before Lincoln

1 appointed defense counsel; and attorney fees and costs incurred in the case at bar. Plaintiff also  
2 seeks punitive damages for tortious breach of the covenant of good faith and fair dealing.  
3 Defendant is not currently seeking any damages, but has reserved its right to seek reimbursement  
4 for any defense or indemnity paid on non-covered claims, and has a pending cross-complaint for  
5 declaratory relief and reimbursement against plaintiff.

6 12. Settlement and ADR: The parties have requested a conference call with the ADR  
7 Coordinator. Defendant has requested a settlement demand from plaintiff, which plaintiff has  
8 promised to provide, but which has not yet been received. Defendant has promised to  
9 participate in any mediation in the underlying case by sending to that mediation not just the  
10 claims person handling the underlying case but also counsel handling the instant bad faith case,  
11 so that both the bad faith case and the underlying case can be resolved at the same time if at all  
12 possible, assuming this case is still pending at that time. Plaintiff believes that having two  
13 separate ADR efforts (one for the underlying case and a second ADR process for this bad faith  
14 action) makes no sense; and that there should be some joint ADR plan to address the connection  
15 between the two cases and the need to achieve a global settlement, if possible. However, the  
16 parties recognize that the Napa Superior Court and this Court don't share jurisdiction and the  
17 best course is for all parties in both cases to attend the mediation in the underlying action. The  
18 parties are asking this court to recognize that effort in making orders concerning the ADR  
19 process in this case.

20 13. Consent to Magistrate Judge for All Purposes: Plaintiff consents to have a  
21 magistrate judge conduct all further proceedings. Defendant Lincoln General does not consent  
22 to have a magistrate judge conduct all further proceedings.

23 14. Other References: Defendant Lincoln General does not believe this case is  
24 appropriate for reference. Plaintiff agrees.

25 15. Narrowing of Issues: Defendant Lincoln General intends to narrow the issues by  
26 motions for summary judgment and/or summary adjudication. Defendant believes that the  
27 introduction of evidence can be expedited with use of stipulated facts and re authenticity of  
28 relevant documents. Plaintiff will consider all appropriate pre-trial stipulations; and will enter

1 into those stipulations that will best expedite the introduction of evidence at trial.

2 Defendant further requests that any trial of this action be bifurcated so that legal issues  
3 regarding coverage can be presented first, and bad faith issues, if any remain available, be tried  
4 in a subsequent phase. If a bad faith phase is necessary, defendant requests that it be bifurcated  
5 so that any issue of bad faith conduct be tried before trial on an award of punitive damages is  
6 had.

7 Plaintiff will oppose any Motion for bifurcation of trial because it is not needed.  
8 The issues to be tried are simple and straight forward. Pre-trial motions can address issues of  
9 law. The issues of fact are not so numerous or complex that formal bifurcation is needed to  
10 assist the trier of fact in organizing the information presented; and are not such as to create any  
11 significant bias or prejudice for or against any party. The normal order of trial is sufficient  
12 here.

13 16. Expedited Schedule: Defendant believes this case can be tried on a relatively  
14 expedited schedule. Once discovery is completed, the parties can move for summary judgment  
15 or summary adjudication with cross-motions on an expedited briefing schedule. Plaintiff  
16 agrees.

17 17. Scheduling: The parties propose the following dates:

18 Expert designation: December \_\_, 2008

19 Discovery cutoff: November \_\_, 2008

20 Hearing of dispositive motions: December \_\_, 2008

21 Pretrial conference: January \_\_, 2009

22 Trial: March \_\_, 2009

23 18. Trial: Phase one of the trial will involve pure questions of law regarding  
24 coverage and is tried to the Court. Defendant proposes that all phases of trial be tried to the  
25 Court.

26 Plaintiff demands a jury trial (see No. 20 below). Plaintiff opposes any Motion to  
27 bifurcate the trial. Questions of law will already be disposed of with Defendant's summary  
28 judgment / adjudication motions; and any cross-motions.

1           19.    Disclosure of Non-party Interested Entities of Persons:       Defendant has filed  
2 the Certification of Interested Entities or Persons pursuant to Local Rule 3-16. Its certification  
3 provides:

4           Pursuant to Civil L.R. 3-16, counsel for Defendant submits the following Notice of  
5 Interested Parties.

6           The undersigned, counsel of record for Defendant LINCOLN GENERAL INSURANCE  
7 COMPANY, certifies that the following listed party or parties may have a pecuniary interest in  
8 the outcome of this case. These representations are made to enable the Court to evaluate  
9 possible disqualification or recusal:

10           Kingsway Financial Services Group—parent corporation of Walshire Assurance  
11 Company.

12           Walshire Assurance Company—holding company for Lincoln General Insurance  
13 Company.

14           Pursuant to Local Rule 3-16(b)(3), Counsel for Plaintiff certifies that no such interest is  
15 known other than that of the named parties to the action.

16           20.    Other Matters:

17           Pursuant to Local Rule 3-6 Plaintiff hereby demands trial by jury of all issues in this  
18 action.

19           Dated: July 24, 2008

BURNHAM BROWN

20                               By /s/ Alison F. Greene  
21                               ALISON F. GREENE  
22                               Attorneys for Defendant LINCOLN  
                                  GENERAL INSURANCE COMPANY

23           Dated: July 24, 2008

MURPHY, LOGAN, BARDWELL  
& LOOMIS

25                               By /s/ Paul Loomis  
26                               PAUL LOOMIS (SBN 111754)  
27                               Attorneys for Plaintiff  
28                               BRANDON IMHOFF dba BBI  
                                  CONSTRUCTION

Re: Brandon Imhoff dba BBI Construction v. Lincoln General Ins. Co., et al.  
Court: United State District Court, Northern District of California  
Action No: C-08-02127 MEJ

**PROOF OF SERVICE**

I declare that I am over the age of 18, not a party to the above-entitled action, and am an employee of Burnham Brown whose business address is 1901 Harrison Street, 11<sup>th</sup> Floor, Oakland, Alameda County, California 94612 (mailing address: Post Office Box 119, Oakland, California 94604).

On July 24, 2008, I served the following document(s) in the following manner(s):

**JOINT INITIAL CASE MANAGEMENT CONFERENCE STATEMENT  
and PLAINTIFF'S REQUEST FOR TRIAL BY JURY**

- ☒ **MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon, in the United States mail at Oakland, California, addressed as set forth below:
- ☐ **FACSIMILE:** By transmitted a true copy, via facsimile electronic equipment transmission (fax) to the office(s) of the addressee(s) at the fax number(s) below.
- ☐ **PERSONAL DELIVERY:** By personally delivering to and leaving a true copy thereof with the following person(s) at the following address(es) on the date set forth above.
- ☐ **PERSONAL DELIVERY BY MESSENGER:** By consigning the document(s) listed above to a messenger service for personal delivery to the following person(s) at the following address on the date set forth below.
- ☐ **OVERNIGHT:** By placing a copy thereof into envelope(s) bearing the name(s) and address(es) and county(ies) of the person(s) to be served by commercial carrier service for overnight delivery as shown below.

J. Michael Murphy, Esq.  
MURPHY, LOGAN, BARDWELL & LOOMIS  
2350 First Street  
Napa, CA 94559  
Telephone: (707) 257-8100  
Facsimile: (707) 257-6479

Counsel for Plaintiff  
BRANDON IMHOFF dba  
BBI CONSTRUCTION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 24, 2008.

  
Linda Andrew-Marshall

876066